

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-47**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Ms Yvonne Tavares
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: November 27, 28 & 29, 2007

ISSUE(S): Two-year Determination of Employment

RELEVANT SECTIONS: Sections 107, 109 and 110(1)(d) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Sections 7 and 8 of Manitoba Regulation 37/94

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

The Appellant, [text deleted], is appealing the Internal Review decision dated February 16, 2006, with respect to the two-year determination of his employability. That Internal Review decision confirmed the case manager's decision of February 20, 2004 and dismissed the Appellant's Application for Review. The Internal Review Officer found that the evidence before him established that the Appellant was capable of carrying out the essential duties of the determined

position at the time the determination was made. It is from this decision that the Appellant has now appealed.

At the outset of the hearing, counsel for the Appellant advised that the Appellant was withdrawing his appeal from the Internal Review decision of February 16, 2006 respecting the termination of funding for chiropractic treatments.

The Appellant was involved in a motor vehicle accident on June 29, 2000. He was driving a [text deleted] bus and drove over a large ridge of gravel at approximately seventy (70) kilometers per hour. The Appellant was thrown forward and landed hard into the seat of the bus. His shoulder and lap restraining seat belt was quite loose allowing a lot of motion. He was bounced around in his seat. Following the accident, the Appellant continued on his normal route.

As a result of the accident, the Appellant complained of severe neck pain and headaches, left shoulder pain with pain radiating to the left arm, right shoulder pain, severe left hip pain radiating to the left leg, lower back and mid-back pain.

At the time of the motor vehicle accident, the Appellant was employed as a [text deleted] bus driver and he and his wife were the owners/operators of a [text deleted] restaurant. Due to the injuries which the Appellant sustained in the motor vehicle accident, he was unable to continue with his duties as a restaurant operator (he was off work temporarily from his position as a [text deleted] bus driver due to his injuries, but he was able to return to that position). As a result, the Appellant became entitled to Income Replacement Indemnity ('IRI') benefits based upon his position as a restaurant operator.

Ultimately, it was determined that the Appellant would not be able to return to his employment as a restaurant operator, given the job demands of that position. Indeed, the Appellant and his wife sold the [text deleted] restaurant as they could not manage the operation of the restaurant without the Appellant. As a result, MPIC took steps to determine an alternate employment for the Appellant.

A Transferable Skills Analysis ('TSA') was completed on April 16, 2003 to assess the Appellant's skills and abilities with respect to alternate employment. Based on this assessment, the following was concluded:

- As noted in the medical reports provided, it appears [the Appellant] is unable to perform all of the job duties of his previous job as a restaurant owner/operator/cook.
- There are alternate employment options which [the Appellant] is able to pursue based on his current level of education, training, experience and physical abilities.

...

CONCLUSION

Based on the criteria including [the Appellant's] physical abilities, education and experience, the following positions had been considered potentially suitable for him:

NOC #0631 – Restaurant and Food Service Managers
NOC #6212 – Food Service Supervisors
NOC #0632 – Accommodation Service Managers
NOC #7412.2 – School Bus Drivers
NOC #7414 – Delivery Drivers
NOC #1453.1 and NOC #1453.3 – Customer Service, Information and Related Clerks
NOC #6435 – Hotel Front Desk Clerks

On July 11, 2003, the Appellant underwent a Functional Capacity Evaluation ('FCE') in order to determine his functional ability and to assist in determining suitable alternative employment. The FCE concluded that the Appellant's overall strength category was within the Light overall strength capacity.

A labour market survey was subsequently carried out in order to further assess suitable alternate employments for the Appellant. In a report dated November 20, 2003, [text deleted], the rehabilitation consultant, advised as follows:

As discussed with you, a labour market survey had been completed on the occupations of Restaurant and Food Service Managers (NOC #0631) and Food Service Supervisors (NOC #6212). Contacts with employers indicated that the amount of standing and walking were extended and that accommodations could not be provided to allow for positional changes. Further, these contacts also indicated that food service managers and food service supervisors would also be required to assist with the cooking and preparation of food, serving of food and cleaning.

A labour market survey based on the job title of Delivery Drivers (NOC #7414) confirmed that [the Appellant] meets the necessary requirements to be considered for this position, including education, work experience, training and physical ability. His previous experience working as a delivery driver with [text deleted] (where he operated his own vehicle to make deliveries) [text deleted] and in working as a bus driver (NOC #7412) [text deleted], is considered to be an asset. As I have not been in contact with [the Appellant] since our meeting, I am not aware if he currently drives a [text deleted] bus.

...

To summarize, it appears from the labour market calls, the position of Delivery Driver (NOC #7414) exists in [text deleted]. It also appears that in speaking with the employers regarding these positions, [the Appellant] meets the qualifications and job demands to perform the work duties of this position. As noted in the labour market calls, the job demands vary from one employer to another and accommodation/assistance is available as required.

MPIC's case manager then sought an opinion from [MPIC's doctor] of MPIC's Health Care Services Team as to the Appellant's capacity to work as a full-time courier driver.

In a response dated December 17, 2003, [MPIC's doctor] advised as follows:

As the clmt is reporting very restricted cervical ROM at this time, it would seem prudent to assess this function in vivo (ie: by driving testing).

If the claimant is still driving recreationally then it would follow that he is capable of performing this task occupationally.

In a follow-up Inter-Departmental Memorandum dated January 15, 2004, [MPIC's doctor]

confirmed her previous opinion as follows:

COMMENTS:

The Case Manager has provided a Jobs Demands Analysis undertaken by an occupational therapist. The therapist provided opinion that the claimant met the demands of a courier driver. In speaking with the claimant on December 5, 2003, the Case Manager advised that the clamant (sic) reported that his neck range of motion was so restricted that he had to use his upper body to shoulder check during lane changes. The claimant was of the opinion that he could not work as a courier driver based on the restricted range in his cervical spine.

In a prior interdepartmental memorandum of December 17, 2003, it was noted that at the time of evaluation with [Appellant's doctor #1] in March 2002, global cervical ranges were observed to be reduced, however, [Appellant's doctor #1] provided comment that a "fully functional" range was demonstrated.

The Case Manager has brought to my attention a Functional Capacity Evaluation undertaken in July 2003 wherein cervical ranges were documented. The ranges observed in July 2003 were less than those observed by [Appellant's doctor #1] in March 2002, specifically noting the following: cervical flexion at 26°, extension at 15°, left rotation at 25°, right rotation at 31°, left lateral flexion at 12° and right lateral flexion at 26°. Although this evaluation noted cervical range decreased from ? to ½ through all ranges (with the exception of extension, which was limited to ? of a standardized baseline). The Case Manager has advised that the claimant is currently employed as a [text deleted] bus driver, as well as having submitted travel expense claims to attend chiropractic appointments.

As the claimant demonstrates capability of driving a vehicle (ie. [text deleted] bus), it would follow that he would be capable of performing this task occupationally with respect to the courier position. (underlining added)

Case Manager's Decision

Based upon the results of the FCE and the Health Care Services review, MPIC completed a two-year determination of the Appellant's employment. In a decision dated February 20, 2004, MPIC's case manager wrote to the Appellant to advise as follows:

The purpose of a two-year determination is to determine your residual earning capacity given your functional ability after medical rehabilitation, educational upgrading (if applicable), as well as utilizing the skills you acquired during your history of work.

At the time of the accident, you were self-employed as a restaurant owner/operator. Based on the medical information, you were unable to return to this employment on a

full-time basis. As such, a Functional Capacity Assessment was completed in July of 2003 to determine your functional ability. Based on the assessment, you have demonstrated the ability to perform work at a light level. This would include occasional lifting of weights eleven to twenty pounds and frequent lifting of weights one to ten pounds during a workday.

Based on the Functional Capacity Assessment and our Health Care Services Review, you are capable of holding full-time employment as a messenger/courier driver, which is the determined employment. The equivalent in the National Occupational Classification (NOC) Index would be that of a Courier/Messenger, Code 7414.

Internal Review Officer's Decision

As previously noted, the Appellant sought an Internal Review of that decision. In the Internal Review decision dated February 16, 2006, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer based his opinion upon the Inter-Departmental Memorandum of [MPIC's doctor] dated January 30, 2006 and notes the following at page 6 of his decision:

Documentation from [Appellant's doctor #2's] office confirmed that [the Appellant's] regular Class 5 license had been reinstated but that [Appellant's doctor #2] indicated he had concerns about [the Appellant] driving a [text deleted] bus. Based upon the review of the new medical information received, [MPIC's doctor] indicated on page 10 of her memorandum:

“Having reviewed the available medical documentation, there is currently no change to the prior opinion that the claimant was capable of performing the driving duties of a driver courier/messenger as indicated in the Health Care Services memorandum of January 15, 2004. At that time, it was the occupational therapist's opinion that the claimant was physically capable of his determined occupation. Additionally, the claimant was maintaining a personal license and actively driving, as well as pursuing (sic) [text deleted] bus driving. It is noted that when the claimant contacted the case manager on December 5, 2003, he was clear in identifying the limitation and undertaking the determined occupation was a difficulty with cervical rotation/shoulder checking while driving. As stated in the January 2004 opinion, the claimant was demonstrating the capability of personal [text deleted] bus driving at that time; driving a vehicle for courier purposes would not be seen as different from a driving capability perspective”.

Commenting on [Appellant's doctor #2's] subsequent involvement in your care, [MPIC's doctor] went on to indicate her opinion with respect thereto (at page 10):

“The opinion provided regarding capability of courier/messenger work does not discount the fact that the claimant experiences neck pain and stiffness with motion. The medical issue being addressed, however, relates to functional measures and activity (in this case, driving) which the claimant was demonstrating as of February 20, 2004 as he continued to drive his personal vehicle and [text deleted] bus. Additionally, objective testing in August of 2005 and subsequent reinstatement of a Class 5 license substantiates capability of driving, despite a stiff and painful neck.”

The evidence I have reviewed establishes, on a balance of probabilities, that [the Appellant] was capable of carrying out the essential duties of his determined position at the time the determination was made. This fact is borne out by the numerous reviews of the file by the MPI Medical Consultant, [MPIC’s doctor], with which I concur. As noted by [MPIC’s doctor], your client was in fact operating a school bus at the time of the determination.

Appeal

It is from this decision, that the Appellant has now appealed to this Commission.

The relevant sections of the MPIC Act and Regulations are:

New determination after second anniversary of accident

107 From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

Considerations under section 107 or 108

109(1) In determining an employment under section 107 or 108, the corporation shall consider the following:

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any knowledge or skill acquired by the victim in a rehabilitation program approved under this Part;
- (c) the regulations.

Type of employment

109(2) An employment determined by the corporation must be

- (a) normally available in the region in which the victim resides; and

- (b) employment that the victim is able to hold on a regular and full-time basis or, where that is not possible, on a part-time basis.

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

...

- (d) one year from the day the victim is able to hold employment determined for the victim under section 107 or 108;

Manitoba Regulation 37/94:

Meaning of employment normally available

7 For the purpose of clause 109(2)(a) of the Act, an employment is normally available to a victim when, at the time the corporation determines an employment for the victim,

- (a) the employment is being performed or is about to be performed by the victim;
- (b) the employment or the category of employment is the subject of an advertisement for employment; or
- (c) the employment or the category of employment exists and is likely to continue as an employment or category of employment within the foreseeable future.

Meaning of unable to hold employment

8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

At the hearing of this matter, the Commission heard testimony from the following individuals:

[Text deleted] – the Appellant:

[The Appellant] testified that physically he is not able to hold employment as a courier/delivery driver as determined by MPIC. He advised that:

- He was not capable of the lifting and carrying requirements necessitated by most of the delivery positions.
- He had limited cervical range of motion and was really unable to rotate his neck. He would turn his whole body in order to perform a shoulder check. Otherwise

he was not capable of doing a proper shoulder check while driving.

- He had been able to continue driving the [text deleted] bus after the motor vehicle accident because it, “kept his sanity”. However, he could only do it for half an hour at a time and when he finished his bus route, he had to come home and lie down. Twenty (20) to thirty (30) minutes was the maximum amount of time he could drive.
- He cannot squat and cannot get down on one knee.
- His ability to climb stairs is limited. He could possibly climb two flights of stairs per day, at a slow pace.
- He experiences severe neck and back pain with recreational driving.
- He no longer does any of the physical outdoor work around his home, including grass cutting, yard maintenance and snow clearing.
- His wife assists him with getting dressed and some personal grooming tasks.
- Overall, he does not feel that he has the capacity to hold employment as a courier/delivery driver due to the injuries from the motor vehicle accident.

[Text deleted] – the Appellant’s treating chiropractor

[Appellant’s chiropractor] testified that:

- She had treated [the Appellant] in 1994 for injuries sustained in an accident when he slipped and fell on some steps. He was treated fifteen (15) times for slow recovery of the injuries to his left shoulder, left hip and subsequent headaches.
- She then began treating [the Appellant] since June 29, 2000, the date of his motor vehicle accident and has treated him since that time.
- She tried all types of treatments on [the Appellant] in order to assist him with his pain

complaints, with limited success.

- In her opinion, the Appellant is incapable of driving as a courier.
- Sitting for long periods, especially driving, lifting and bending, climbing in and out of a car, up and down stairs would all aggravate his condition as demonstrated by the aggravation of his condition when he was driving a [text deleted] bus.
- It is completely unrealistic to expect [the Appellant] to hold employment as a courier driver.
- The Appellant does have a significant functional limitation in his neck range of motion. He is also incapable of heavy lifting.
- The Appellant suffered from headaches and muscle spasms that interfere with his sleep and all of his activities of daily living.
- The Appellant's condition had plateaued and that he would not get any better. In fact, she felt that his condition would likely continue to deteriorate.
- Although she did not have a job description of a courier/delivery driver available to her when she gave her opinion that [the Appellant] could not hold this employment, she maintains that he could not handle the amount of driving involved in that occupation nor could he handle the constant getting in and out of a vehicle up to one hundred (100) times a day.

[Text deleted] - the Appellant's wife:

The Appellant's wife testified that:

- The Appellant did not have any back pain before the motor vehicle accident of June 29, 2000.
- After the accident, [the Appellant] could not stand for very long, could not do any of the

cooking required at the restaurant, had trouble taking orders at the window and had to lie down four (4) or five (5) times throughout the day. Since [the Appellant] could not carry out the duties required to operate the restaurant, they had to sell the restaurant business

- Her husband does very little recreational driving – twenty (20) or thirty (30) minutes maximum. Then she takes over the driving.
- She assists her husband with his personal grooming – she dries his back, does up the laces on his shoes, helps put on his jacket.
- Her husband loved his job as a [text deleted] bus driver, so he continued to do it. However, he would have to lie down as soon as he returned home from his shift driving the [text deleted] bus.
- Her husband has great difficulty lifting and carrying: he can't cut the grass, he can no longer perform yard work, lifting a laundry basket is difficult.
- She does not believe that her husband could carry out the job of a delivery driver for any sustained period of time. He wouldn't be able to undertake the substantial driving required or the substantial lifting and carrying.

[Text deleted] – a vocational rehabilitation consultant [text deleted]

[MPIC's vocational rehab consultant] testified that:

- MPIC had requested her vocational services in order to assist in determining whether or not [the Appellant] was able to carry out the essential duties of the determined position of a “delivery courier/messenger”.
- There was some confusion surrounding the occupational classifications chosen by the case manager. She distinguished the difference between the National Occupational Classification (‘NOC’) #7414 and NOC #1463.

- The case manager appeared to have mistakenly used the term “messenger” in his statement in the two-year determination. Although he did use the right NOC classification – ie #7414, just the incorrect term.
- Since the NOC of 1992, the job title corresponding to NOC #7414 has changed to delivery and courier service drivers, otherwise there were no differences between the 1992 and 2001 versions of the NOC’s for code #7414.
- NOC #7414 required a medium strength capability.
- NOC #7414 was a large unit group, and within this unit group there was a large number of people, within a variety of industries.
- There would likely be a range of physical demands between each title within this unit group and, as such, not every delivery position might require medium strength capacity.

[Text deleted] – an occupational therapist [text deleted]

[MPIC’s occupational therapist] testified that he had been requested by MPIC to conduct a physical demands analysis on three (3) delivery driver positions:

1. the position of a delivery driver for [text deleted];
2. the position of an auto parts delivery driver with [text deleted]; and
3. the position of courier driver with [text deleted].

[MPIC’s occupational therapist] testified with respect to the physical demands analysis which he carried out in respect of each of those three (3) positions. He gave further evidence as to the requirements of each of the positions and as noted in the written reports which he prepared for MPIC.

[Text deleted] – a certified athletic therapist [text deleted]

[Appellant's athletic therapist] testified with respect to his report of September 24, 2007 and stated that:

- he had reviewed the available medical and claim information to determine if [the Appellant] was capable of holding the determined employment as at February 20, 2004.
- there was nothing in the medical reports about the limitations in [the Appellant's] driving capabilities.
- climbing stairs was not determined to be a problem for [the Appellant]
- there was no medical information that [the Appellant] was incapable of working full time.
- from the reports he reviewed, [the Appellant's] driving ability wasn't measured.
- he had no data on [the Appellant's] range of motion, or that [the Appellant] had difficulty sitting for long periods of time, climbing in and out of a vehicle, or that his trunk extension and flexion were limited.

Appellant's Submission

Counsel for the Appellant argues that the case manager was incorrect in the two-year determination of the Appellant as a messenger/courier driver, corresponding to NOC #7414, for the following reasons:

1. NOC #7414 requires an overall strength capacity of medium.
2. The FCE of July 11, 2003 determined that the Appellant was capable of light duties within the overall strength category.
3. The TSA classified the strength requirements of NOC #7414 delivery drivers to be medium.
4. Therefore, on the face of it, the job classification of NOC #7414 delivery driver was

not suitable for an individual who was capable of light duties only.

5. The Appellant cannot drive for an eight (8) hour work day based upon his reported inability to properly shoulder check and his subjective complaints of pain which severely limit his ability to drive for any extended period of time or to work a full eight (8) hour day.
6. [MPIC's doctor's] conclusions have no basis in deductive logic. She based her opinion upon the limited information which she received from the case manager and deduced a conclusion that was completely wrong (ie: if the Appellant can drive a bus, he can be a courier).
7. [Appellant's doctor #3's] opinion set out in his report of February 28, 2005 that the Appellant was unable to pursue courier work. [Appellant's doctor #3] advised that the Appellant will probably never make full functional recovery. He reported that the Appellant moved very slowly and is essentially consumed by the pain and disability and his ability to function at any job was questionable.

As a result of the foregoing factors, counsel for the Appellant maintains that the two (2) year determination was incorrect. He argues that the Appellant did not have the ability to carry out the essential duties of a courier/delivery driver as at February 20, 2004, and in fact is not able to work at any occupation. Therefore, counsel for the Appellant submits that MPIC's determination should be rescinded and the Appellant's IRI benefits be reinstated.

MPIC's Submission

Counsel for MPIC argues that the case manager's decision was based upon several assessments and investigations of the Appellant's functional capabilities and was a suitable two-year

determination. In support of his position, he notes the following:

- [Appellant's doctor #1's] report dated March 18, 2002, found that although the Appellant's neck had some loss of range of movement, he was fully functional.
- [The Appellant] was still capable of driving a school bus and his own vehicle with his restricted neck range of motion.
- [The Appellant] had some relevant driving experience, having been previously employed as a delivery driver.
- The Appellant does not have to meet every potential duty required of a determined position; just the essential duties.
- The classification of the NOC #7414 position as requiring medium strength capability is relevant to the two-year determination, but not determinative of the issue.
- A courier/delivery driver allows for positional changes – ie sitting, standing and walking.
- [Appellant's chiropractor's] opinion as to whether the Appellant could work is not entitled to a lot of weight.
- The Appellant never mentioned that he was limited in the amount of time he could spend driving or that he was limited in climbing stairs.

Based upon the foregoing factors, counsel for MPIC submits that the evidence in February 2004 as relied upon by the case manager was that:

- The Appellant had the functional capacity to carry out the majority of the essential duties of a courier/delivery driver.
- There was no evidence that the Appellant could not do this type of work.
- The Appellant was already doing similar work by driving a [text deleted] bus in 2004.
- There was no evidence to support the Appellant's contention that he could only drive for

a limited time.

Accordingly, counsel for MPIC submits that the two-year determination of the Appellant as a delivery/courier driver was appropriate and that the Appellant's appeal should be dismissed and the Internal Review decision dated February 16, 2006 confirmed.

Discussion

Upon a careful review of all of the medical, paramedical and other reports and documentary and oral evidence filed in connection with this appeal, and after hearing the submissions of counsel for the Appellant and of counsel for MPIC, the Commission finds that the two-year determination of the Appellant as a courier/delivery driver was inappropriate.

Pursuant to Section 107 of the MPIC Act, in determining an employment under Section 107, MPIC is required to consider the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination. We find that MPIC did not properly consider the Appellant's physical abilities when determining that he could hold employment as a courier/delivery driver, for the foregoing reasons:

- The FCE classified the Appellant as capable of light strength capacity. The transferable skills analysis and the NOC classified the position of courier/delivery driver as requiring medium strength capacity. Lifting and carrying are primary requirements for the position of a courier/delivery driver. Although there may be a range of physical demands within the job classification of courier/delivery driver, the NOC classifies the position as requiring on average a medium strength capacity. Indeed, most of the available positions identified by MPIC required medium and heavy lifting. The Appellant's ability to lift

only up to thirty (30) pounds on an occasional basis would seriously limit his employability within this class of employment. As such, we are not satisfied, on a balance of probabilities, that the Appellant could hold this type of employment on a regular and full time basis or that he met the physical requirements of this position based upon the overall strength requirement of medium capability.

- No consideration was given to the Appellant's restriction in his neck range of motion; his inability to properly shoulder check; his limited tolerance for driving; his complaints of severe pain which limit his stamina and endurance for daily activities; his inability to climb stairs and his overall poor functional status.
- [Appellant's chiropractor's] opinion that the Appellant should not drive a [text deleted] bus and could not carry out the duties of a courier driver.
- [Appellant's doctor #3's] opinion that the Appellant could not pursue courier work and that the Appellant was essentially consumed by his pain and disability and that his prognosis for return to work in these types of jobs was poor.
- [MPIC's doctor's] conclusion that since the Appellant demonstrated the capability of driving a vehicle (ie [text deleted] bus) it would follow that he would be capable of performing this task occupationally with respect to the courier position was flawed. [MPIC's doctor] failed to consider the criteria set out in the job description of a courier driver and therefore she was not in a position to properly opine as to the Appellant's ability to perform this employment.
- [MPIC's doctor] also gave no consideration as to whether or not the Appellant could drive a vehicle on a full time basis based upon his functional limitations. The fact that the Appellant could drive a school bus for two (2) thirty (30) minute shifts daily was not determinative of whether or not he had the functional capacity to carry out the

occupational duties of a courier driver on a full time basis.

Accordingly, for the foregoing reasons, the Commission determines that:

- (a) MPIC incorrectly terminated the Appellant's IRI benefits pursuant to Section 110(1)(d) of the MPIC Act; and
- (b) [The Appellant's] IRI benefits shall be reinstated as at February 21, 2005. Interest shall be added to the amount due and owing to Mr. P. in accordance with Section 163 of the MPIC Act.

As a result, the Appellant's appeal is allowed and the Internal Review decision dated February 16, 2006 is therefore rescinded.

Dated at Winnipeg this 28th day of January, 2008.

MEL MYERS, Q.C.

YVONNE TAVARES

PAUL JOHNSTON